Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1614

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA, and DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

RESPONSE TO MEMORANDA IN OPPOSITION FOR WRIT OF CERTIORARI

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Appendix:

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IN THE

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Respondents.

RESPONSE TO MEMORANDA IN OPPOSITION FOR WRIT OF CERTIORARI

Petitioners, Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body (hereafter State Defendants) hereby submit their Response to Memoranda In Opposition For Writ of Certiorari filed by the Solicitor General of the United States and by counsel

for the Board of School Commissioners for the City of Indianapolis.

ARGUMENT

I.

Response to the Board of School Commissioners for the City of Indianapolis

The Petition before this Court arises from a school desegregation case that has been pending in the federal court system since May 31, 1968. In opposing that Petition counsel for the Board of School Commissioners of the City of Indianapolis (hereafter I.P.S.), who have only been involved in that litigation for a little over a year, state in a footnote that they were not submitting a lengthy brief to correct the Petition's "omissions of fact and mischaracterizations of the law on the issues." Then, on the very next page, they make a blatant misrepresentation to the court on the status of this case in the district court, stating:

> . . . Both the United States and the respondent IPS (the original plaintiff and defendant in the intra-district phase of this suit) have joined in urging the implementation of an intra-district remedy in September, 1978; respondent IPS has prepared an intra-district plan for implementation in the Fall of 1978; and the Court of Appeals has ordered that the plan be put into effect unless the District Court determines that it is not sound. (unpublished order in No. 78-1558, May 17, 1978).

The United States and I.P.S. have requested an intra-district remedy for the desegregation of the Indianapolis Public Schools. However, on June 2, 1978, the district court entered an order rejecting the intra-district plan, and ordered an inter-district plan for the reassignment of over 9,000 students to school districts which were not parties to the hearing giving rise to that order.

Thus, even though I.P.S. has proposed an intra-district plan and the court of appeals ordered the district court

to consider the plan, the Court, eleven (11) days prior to I.P.S.'s response to the Petition for Writ of Certiorari, rejected that plan.

Counsel for I.P.S. states that the Petitioners apparently seek to have a summary reversal of the Seventh Circuit based upon the reversal from this Court. In criticizing that position, which action the Petitioners do contend should have been taken, I.P.S. lists several "factors" which if considered "may have an important bearing" on an inter-district remedy in this case. Those factors are precisely the reasons that the Petitioners seek to have this Court reverse the decision of the Seventh Circuit entered on February 14, 1978, and if counsel for I.P.S. would have examined the eight (8) year plus history of this case prior to their appearance, then they would have realized that all of those "factors" had been fully litigated.

As stated in the Petition, there have been three (3) trials in this case which have resulted in extensive Findings of Fact by the district court, those findings encompassing more than 76 pages of the Federal Supplement. The order of remand from this Court was for the Seventh Circuit to reconsider the case in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis,* 426 U.S. 299 (1976).

The extensive record in this case shows that there is no basis for any inter-district remedy, and that record shows that there has been no intent to segregate any of the schools in Indiana by any of the state officials or suburban school districts. Further hearings or opinions by the district court will not develop such non-existent facts. Thus, the Seventh Circuit should have summarily reversed the district court and ordered the district court to dismiss the suburban school districts and the State Defendants, and to proceed with the desegregation of I.P.S. within that district.

It is evident that the district court wants an inter-district remedy since it feels that an intra-district remedy, once implemented, will not work forever. That "feeling" is contrary to the state of the law as developed by this Court and indicates that this Court should compel the Seventh Circuit to follow the order of remand, examine the current findings for any evidence of intent to discriminate, and finding none, to order the dismissal of the Defendants as mentioned above.

II.

Response to the United States

On June 2, 1978, the district court entered an order which alone shows that this Court should grant this petition, although the order is not fully described by the Solicitor General in his memorandum to this Court. The district court, once again, directed the reassignment of over 9,000 black students to school districts in Marion County, Indiana, other than the Indianapolis Public Schools. See copy of Entry appended hereto at page A-1 and see pages A-68 to A-78 of the Petition.

The school districts to which those black students would be delivered are not segregated schools, and they were *found* not to be segregated by the district court, which finding should have ended this case several years ago.

The June 2, 1978 order by the district court was directed at school districts which were not a part of the hearing which produced the order and which were not parties to that proceeding. They were, of course, denied due process of law on the face of the district court's order.

That order was essentially the same "remedy" which the court of appeals affirmed in *United States v. Board of School Commissioners of Indianapolis, Indiana,* 541 F.2d 1211 (7th Cir., 1976), and which this court vacated, 429 U.S. 1068 (1977), but which, now, the district court has re-entered.

The June 2, 1978 order from the district court was the inevitable product of the remand decision in the majority opinion of the court of appeals, and is in direct disregard of this Court's mandate to the court of appeals, and of this Court's decisions. It was accurately discussed by the Solicitor General of the United States in his Memorandum to this Court when this case was here in the 1976 Term in number 76-515 which resulted in the order which vacated the decision of the Seventh Circuit. 429 U.S. 1068 (1977). At that time the Solicitor General correctly spoke to the evidentiary and legal questions in this case at pages 15-17 of his Brief:

> 3. Even if there were evidence that the defendants in this case had engaged in intentional inter-district acts of racial discrimination with inter-district effects, it would not follow that the district court selected the proper remedy. The district court's remedy is designed to provide a degree of racial balance in all of the schools in Marion County. This relief has been prescribed without reference to the nature of the violations or their effects. Indeed, the district court did not even select school districts for inclusion in the plan on the basis of their participation (or lack of participation) in inter-district violations; it included or excluded them on the basis of the percentage of students who were black (see Perry App. A44).[14] The remedy thus is

[14] The remedy was also selected, in substantial part, because the district court believed that "resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less" (Perry App. A42), and that it was necessary to spread black students throughout Marion County in order to prevent schools from reaching this "tipping point" which the district court called "resegregation" (ibid.). We disagree with the implications of this characterization. In our view, the Constitution forbids only racial discrimination and its effects; it does not prohibit racial imbalance in the schools if that imbalance arises from cases other than official racial discrimination. The district court's apparent belief that racial imbalance, however caused, is a violation of the Constitution would abolish the requirement that the racial separation

apparently designed to produce in the schools of Marion County a racial mixture that the courts below believe is desirable, rather than to eradicate the effects of racial discrimination.

We have stated in our memorandum in *Delaware State Board of Education v. Evans,* appeals dismissed for want of jurisdiction, November 29, 1976 (No. 76-416), and *Austin Independent School District v. United States,* vacated and remanded, December 6, 1976 (No. 76-200), that this is not the proper way to formulate the remedy in a school desegregation case. We believe that the principles we have articulated in those cases apply here as well. The goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green v. County School Board,* 391 U.S. 430, 438. It is to eliminate those effects wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189, 203.

In our view, "desegregation" is nothing more or less than the elimination of racial discrimination and all of its lingering effects "root and branch." The desegregation that courts are both empowered and obligated to accomplish is not the elimination of all racial separation without regard to its causes, whether *de jure* acts or *de facto* social processes. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it did, there would be no

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have been caused by acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to live). See *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189; *Spencer v. Kugler, supra.*

meaning to the requirement of state action as a precondition to a violation of the Fourteenth Amendment. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other. See *Austin Independent School District v. United States, supra,* slip op. 4-5 (Powell, J., concurring).

The proper approach requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been some racial discrimination does not in itself support an inference that the discrimination caused all of the observed racial separation. See *Keyes v. School District No. 1, Denver, Colorado, supra.* It therefore does not support a judicial order that racial balance must be produced throughout the school system. See *Austin Independent School District, supra.* This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown v. Board of Education,* 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court at large to produce results that never would have occurred if all constitutional provisions had been observed. The court must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green, supra,* 391 U.S. at 439).

The analysis given by the Solicitor General in No. 76-515 was correct at that time and it is correct today. It explains why this petition should be granted and the writ issued to the Seventh Circuit which failed to follow this Court's order in the case presented on remand. The Solicitor General contends that the Seventh Circuit's order is not a final order, and thus, not reviewable at this time.

However, the brief fails to address the fact that through ten years of litigation no evidence has ever been produced of any intent to segregate any of the suburban schools by any of the defendants in this case, including the Petitioners. Therefore, the Seventh Circuit, based upon the existing record in this case, should have remanded it to the District Court with orders to dismiss the State Defendants and all suburban school districts and to proceed with the desegregation of I.P.S. within that district.

CONCLUSION

The State Defendants would respectfully urge this Court to issue the Writ of Certiorari for which they have prayed.

Respectfully submitted,

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DONALD P. BOGARD
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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NO. IP 68-C-225

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

INDIANA STATE TEACHERS ASSOCIATION,

Intervening Plaintiff,

-vs-

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARY E. BUSCH, as President of The Board of School Commissioners; WALTER KNORR, MARTHA L. MCCARDLE, WILLIAM M.S. MYERS, W. FRED RATCIFF, JAMES R. RIGGS, PATRICIA WELCH, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants.

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON

TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION a public corporate body;

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

-VS-

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

ENTRY

This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of PIP be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.
> "We fail to see how the district court abused its discretion when it was clearly acting within the

guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

"Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete segregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board*, 541 F.2d 1211, 1223.

Further, this court believes that the interdistrict remedy previously ordered by it can and should be put into effect at once, wholly apart from the considerations posed by such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis,* 426 U.S. 229 (1976). These cases, requiring a finding of a racially discriminatory intent as a prerequisite to the granting of equitable relief, deal purely and simply with the limits on the power inherent in a federal court of equity to rectify problems arising as a result of segregation.

As a matter of constitutional law, then, the Court of Appeals has held, following the mandate of the Supreme Court, the *Arlington Heights* and *Washington v. Davis* must be considered by this court. This court will do so and will express its findings in a very short time. *Meanwhile, however, it is respectfully submitted that the State of Indiana has provided a remedy which this court has followed, but which has heretofore never been considered by the Court of Appeals because no appellant added defendant school corporation has raised or challenged the point.*

In its Supplemental Memorandum of Decision dated December 6, 1973, 368 F.Supp. 1191 beginning at 1223, this court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation. Various possible approaches were pointed out, but with no suggestion as to which would be preferable; indeed, the General Assembly was encouraged to come up with a workable solution of its own.

Shortly thereafter, during its 1974 session, the General Assembly acted promptly upon this court's suggestion, and adopted a method by which any state or federal court in Indiana could order transfers of students from segregated school corporations to other school corporations, and provided a workable method of reimbursement to the transferee corporations. This Act was written, passed, and in force under an emergency clause on February 20, 1974—only 76 days after it was suggested by this court as one possible means of meeting the problem! I.C. 1971, 20-8.1-6.5-1, et seq. The Act provides that three essential elements be met in order for the transfers to take place, as follows:

(1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and

(3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the

transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington v. Davis* analysis of the transferee corporation, nor that it have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

At the time the Indiana Transfer Act (ITA) was passed, this case was on appeal, and continued in this status until April 21, 1975, on which date the Supreme Court denied certiorari as to the decision of the Court of Appeals dated August 21, 1974, 503 F.2d 68. That decision directed this court to have a further hearing to determine whether, under the guidelines of *Milliken v. Bradley,* 418 U.S. 717 (1974), a case decided by the Supreme Court while the Indianapolis case was on appeal, an interdistrict remedy was justified within the area of Uni-Gov. Such a hearing was held, and the question answered in the affirmative on August 1, 1975 (Indianapolis IV), 419 F.Supp. 180. That decision was affirmed by the Court of Appeals on July 16, 1976, 541 F.2d 1211, but the latter decision was vacated and remanded by the Supreme Court on January 25, 1977, 429 U.S. 252. The Court of Appeals then vacated and remanded the decision of this court on February 14, 1978 (mandate received March 31, 1978). The latter decision is as yet unreported.

In its opinion of August 1, 1975, this court specifically stated that in addition to the *Milliken* question it would also consider matters of Indiana law, thus:

> "This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianapolis without a like

> reestablishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana law, all as will more fully appear" 419 F.Supp. 180, at 182.

After answering the *Milliken* question in the affirmative, this court then immediately launched into a discussion of the ITA, pointed out its essential elements as previously set out in this opinion, and then set out its findings as follows:

> "In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:
>
> (a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States v. Board of Sch. Com'rs, Indianapolis, Ind.,* 332 F.Supp. 655 (S.D. Ind. 1971), aff'd 474 F.2d 81 (7 Cir.), cert. den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).
>
> (b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. 'In the long haul, it won't work.' 332 F.Supp. at 678.
>
> "This Court found as a fact in its opinion of July 20, 1973, 368 F.Supp. 1191, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or

less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F.2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

"The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment." 419 F.Supp. 180, 184.

This court then ordered that a certain number of black students be transferred from IPS to various other school corporations within the Uni-Gov area. In a separate order of the same date, exact numbers of students were assigned to each transferee school. IPS was ordered to identify the transfer pupils and then to submit to this court a final plan for desegregation of the remaining students within IPS. 419 F.Supp. 186. (IPS has not complied with this order in any particular; indeed, it specifically directed its Director of Planning to disregard it and to work up the PIP plan when he brought such order to the attention of the present Board. Testimony of witness Payne, May 30, 1978.)

In making the explicit findings compatible with ITA, as above set out, this court was obviously acting pursuant to the terms of that act. Not one of the transferee corporations named in the accompanying orders of the court challenged these findings on appeal. Rather, they raised the false issue that there was insufficient evidence to support the *Milliken* findings. This very clever maneuver on the

part of such added defendants has been successful to date, since the Buckley plaintiffs have sought only to meet the errors asserted by added defendants (and the original plaintiff), and have wholly failed to point out to the Court of Appeals that the remedy provided by the State of Indiana makes it unnecessary to consider the constitutional issues which would otherwise require solution. However, the time in which a transferee corporation could have questioned this court's findings has long since passed, so there would appear to be no reason why this court's orders, based on ITA, should not be carried out.

Long established practice holds that questions of constitutionality are not to be decided unless such adjudication is unavoidable. *Kelly v. Illinois Bell Telephone Company,* 325 F.2d 148 (7 Cir. 1963). Although application of ITA requires constitutional determinations to be made by the trial court, such have in this case been made long ago and have either been affirmed on appeal or not raised on appeal. They are now *res judicata,* and ITA may and should be applied.

This court was ordered to consider the merits of the PIP plan. Of course, it had already done so insofar as could be done in view of the incompleteness of the submission, when it denied permission to implement the plan on April 7, 1978, after hearing the arguments of counsel on April 6, 1978. However, in order to supplement the record, and to develop facts required to meet the questions posed by the Court of Appeals, a further hearing was had on May 30-31, 1978. The United States offered no evidence, but evidence was presented by IPS, the Buckley intervening plaintiffs, and by intervening plaintiff Indiana State Teachers Association. From the evidence heard the court finds as follows:

(A) PIP is not sound (apart from any interdependence with an interdistrict remedy) as a remedy to be put into effect in 1978-79, because:

(1) It is not complete in that Phase III (the plan for the elementary schools) has not even begun except for the two-page skeleton filed May 26, 1978 at 4:13 p.m. Even the skeleton had not been adopted at the time it was filed, and was not adopted until some sort of a hurry-up meeting was held on Memorial Day, May 29.

(2) It cannot be implemented as to Phase II (upper elementary) because Phase II (the details of which were only filed on May 26, 1978 at 4:13 p.m.) depends upon the use of two buildings which are not even in existence, and which will not be completed for a matter of years. Most of the other proposed upper elementary schools require remodeling or additions which will require until January, 1979 to complete.

(3) It should not be implemented as to Phase I (high schools), as it is unnecessarily complicated and substantially destroys the stability of presently stable elementary schools.

(a) There are only two high schools which are substantially out of phase which the Board's own guidelines. Both schools have an unduly high black population, but this has come about since the filing of this action as a matter of demographic movement. It is not necessary to reorganize the high school patterns in the whole city to change the racial balance in two schools.

(b) The PIP plan provides that elementary students may only attend schools located in their ultimate high school attendance areas, so that many present elementary attendance areas will be split.

(4) PIP has been discussed either minimally, or not at all, with IPS teachers, with the exception of the options aspect. A new plan of massive reassignments which has not been explained to the teachers will not function well, if at all.

(5) The main selling point of the PIP plan was the options plan for the elementary schools. Only 20% of the elementary children, or their parents, made a choice under the options plan. As a result IPS has *voluntarily* abandoned the options plan, except for a few pilot schools.

(6) While IPS was attempting to sell its options plan to parents, teachers, pupils, and the public, it gave no general publicity to the fact that PIP in its entirety was in reality a massive desegregation plan.

(a) Consequently, the public, parents, teachers, and pupils are unprepared for PIP.

(b) The above facts will hinder or defeat the success of PIP, according to IPS's own witnesses.

(7) IPS to this date has not furnished the court with any estimate as to the number of students who will be dislocated and reassigned from the present schools under PIP.

(8) PIP represents a "massive 'fruit basket' scrambling of students . . ." which both this court, 332 F.Supp. 655, 678, and the Court of Appeals have said " 'won't work' in the long run." Moreover, all witnesses who testified on this point at the hearing of May 30-31, including the defendant Superintendent of Schools of IPS, agreed with this statement.

(B) The representation that PIP cannot be implemented for 1978-79 unless it be approved at about the present time is incorrect.

(1) It could not be implemented for 1978-79 even if it was approved at this time, because:

(a) The options plan has already been abandoned for lack of interest.

(b) The Phase II buildings cannot be built or altered in time.

(C) If PIP were presently approved and implemented for 1978-79, and at some later time an interdistrict remedy were found appropriate, (answering the precise question

put, although an interdistrict remedy is already appropriate under ITA) the implementation of PIP might well interfere with, and in fact prevent entirely the formulation and implementation of interdistrict remedy.

Of the many Supreme Court cases on desegregation, probably the most quoted case after *Brown I*, and certainly the easiest to understand, is *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, (1971). The last two paragraphs of the text in that decision read as follows:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 1, 31.

As stated above, the United States presented no evidence at the current hearing. However, its counsel made an opening statement in which he said, or said in substance, the following:

(1) IPS schools can be desegregated with the IPS only PIP plan.

(2) By desegregated is meant that ". . . if you take all these schools and make them 60-40 or something like that, then theoretically you have fulfilled the constitutional mandate."

(3) The Government will not predict and is not concerned with what will happen after a massive racial balancing plan is put into effect, so long as it is theoretically sound on paper from the standpoint of numbers.

(4) The Attorney General is opposed to any plan which would involve suburban schools.

It seems obvious to this court that if PIP is ordered implemented by the Court of Appeals, the United States will immediately declare IPS desegregated and get out. Indeed, under *Swann* it will be argued by added defendant transferee corporations and perhaps by the Attorney General as well that the case must forthwith end, except for monitoring. The Buckley plaintiffs, representing all black school children in IPS do not want this result, the trial court does not want this result, and the Court of Appeals did not appear to want it when it spoke as set out on pages 1 and 2 of this opinion.

(D) The explanation for it being termed "counterproductive" to put the PIP into effect for the year 1978-79 (or any year) is:

(1) It is unsound, as explained in (A).

(2) It might well block further consideration of any interdistrict remedy, as explained in (C). It is submitted that, contrary to the tentative opinion of the Court of Appeals appearing at the top of page 6 of its May 17 order, such would produce probable injustice.

One other matter remains, as to matters on appeal, and that is the matter of the reassignment of students presently attending the Harry E. Wood High School. This court originally denied the proposed method of reassignment

on no very good basis except that it appeared to be a part of a wholly unsound package (PIP). The court now reverses itself and approves the proposed Wood plan, if it has jurisdiction to do so; if it does not have such jurisdiction, it respectfully suggests that the Court of Appeals order such plan approved.

The court detects a note of urgency in the May 17 order, which is not inappropriate in view of the length of time this case has been in the courts. However, this is no routine case, and in the end should result in implementation of the innovative plan designed by the General Assembly of Indiana, which might well serve as a guide to other troubled school districts.

It is not as if nothing were being done in Indianapolis to relieve segregation. Approximately 9,500 students have been bused daily since 1973 without serious incident; all high schools meet or approach PIP guidelines save two; there are no longer any all white schools at any grade level. The only remaining problem of substance is the several 90% or more black elementary schools, and this problem will be alleviated by application of ITA and relatively minor readjustments thereafter.

ORDER

Having answered all questions put to it by the Court of Appeals, this court now returns to old business. If IPS can draw up a completely new, city wide, Phase III elementary school plan where none at all now exists, and do it in eight weeks (which is testimony about which this court has some reservation), it can surely designate the pupils for transfer to transferee school corporations, and adjust the remaining IPS students even more quickly. It was ordered to make such plans in 1975, and has not done so. The reason is clear—the IPS superintendent testified that

IPS did not want to give up any students or close any schools. This may be a reason, but it is not an acceptable excuse.

It is therefore considered and ordered that the defendant Board of School Commissioners forthwith proceed to formulate a plan for the transfer of black students to the various transferee school corporations, in the same numbers and grade levels, all as set out in this court's judgment dated August 1, 1975. IPS may consult with the transferee schools, but will be sole judge as to what students will be transfereed, and will not delay its plans for purposes of consultation. Such plan should be completed within six weeks from this date, or sooner if possible.

Further orders will be made regarding the implementation of such plan pursuant to ITA at the same time that this court announces its findings and conclusions as required by the Court of Appeals in its remand of February 14, 1978. It is anticipated that the same will be forthcoming in three weeks, more or less, but said planning should begin on receipt of this order.

All of which is considered and ordered this 2nd day of June, 1978.

S. Hugh Dillin, Judge

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